STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Apellee,	UNPUBLISHED June 22, 2004
v TYRONE TINOAH PERRY, Defendant-Appellant.	No. 246928 Wayne Circuit Court LC No. 02-006983-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SAUL VERNARD WILLIAMS, Defendant-Appellant.	No. 247536 Wayne Circuit Court LC No. 02-006983

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendants Tyrone Tinoah Perry and Saul Vernard Williams were convicted in a joint jury trial of armed robbery,[1] assault with intent to rob while armed,[2] and first-degree home invasion.[3] Mr. Perry was sentenced to five to fifteen years' imprisonment for his armed robbery and assault with intent to rob convictions, and five to twenty years' imprisonment for his home invasion conviction. Mr. Williams was sentenced to five to ten years' imprisonment for his armed robbery and assault with intent to rob convictions, and two to twenty years' imprisonment for his home invasion conviction. Both defendants appeal as of right in this consolidated appeal.

[1] MCL 750.529.

[2] MCL 750.89.

[3] MCL 750.110a. Each defendant was acquitted of possession of a firearm during the commission of a felony, MCL 750.227b.

In Docket No. 246928, we affirm Mr. Perry's convictions and sentences for armed robbery and home invasion; vacate his conviction and sentence for assault with intent to rob while armed; and remand for correction of the judgment of sentence to accurately reflect jail credit for time served. In Docket No. 247536, we affirm Mr. Williams's convictions and sentences for armed robbery and home invasion, and vacate his conviction and sentence for assault with intent to rob while armed.

I. Underlying Facts

Defendants' convictions arose from the beating and robbery of Thomas Gaston at the home of Leonard Moultrie. The involved parties had known each other for several years, and were connected through family relationships and close friendships. Shortly before the current attack occurred, Mr. Moultrie and Mr. Williams had a confrontation regarding their girlfriends. On the morning of April 30, 2002, Mr. Gaston was at Mr. Moultrie's home babysitting his son. Mr. Perry and Mr. Williams knocked on the door. When Mr. Gaston opened the door, Mr. Perry struck him in the face with what appeared to be a nine-millimeter handgun, causing his nose to bleed and his eyes to blacken and swell. Defendants took Mr. Gaston upstairs to question him regarding the whereabouts of Mr. Moultrie.

Once upstairs, Mr. Perry struck Mr. Gaston in the eye, causing it to bleed. Defendants repeatedly hit Mr. Gaston in the head and back over several minutes. Mr. Perry threatened Mr. Gaston's life and Mr. Williams accused him of having knowledge regarding windows that were broken during the dispute with Mr. Moultrie. Subsequently, Mr. Perry held Mr. Gaston at gunpoint while Mr. Williams searched the house. Mr. Williams returned carrying a plastic grocery bag. Mr. Perry then gave the gun to Mr. Williams while he tied Mr. Gaston's hands and feet with telephone cords and stole his designer boots. Although he was injured and his vision distorted, Mr. Gaston was able to break the cords and call his mother. Mr. Gaston testified that he received information that defendants might return, so he dressed Mr. Moultrie's child, left the house, and went to a phone booth.

At approximately 12:30 p.m., Mr. Moultrie and his girlfriend returned home to find their door unlocked, clothes strewn about, furniture overturned, and knotted telephone cords on the floor. Numerous items were also missing from the home. They went to look for their child and found Mr. Gaston a short distance away.

II. Double Jeopardy[4]

Both defendants assert that their convictions and sentences for armed robbery and the necessarily lesser included offense of assault with intent to rob while armed, arising from a single crime, amount to double jeopardy as multiple punishments for the same offense.[5] Defendants assert that the two crimes were based on a single robbery that occurred in a continuous time sequence with a single criminal intent. As defendants failed to preserve this issue, our review is for plain error affecting defendants' substantial rights.[6]

When determining whether multiple punishments violate double jeopardy, we must consider whether the Legislature, as the branch of government authorized to establish crimes and their punishments, intended to prohibit multiple punishments under separate criminal statutes based on the same conduct.[7] One test of the Legislature's intent is the federal *Blockburger* test, which indicates that double jeopardy is not violated by conviction of two offenses where each offense requires proof of an additional element not contained in the other offense.[8] However, this Court has found that, even where the offenses share common elements or are a greater and lesser included offense, double jeopardy is not violated where "one crime is complete before the other takes place."[9]

Conviction of both armed robbery and assault with intent to rob while armed clearly constitutes a violation of double jeopardy pursuant to *Blockburger*. To sustain a conviction for armed robbery, the prosecution must show an assault and a felonious taking of property from the

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[4] Our Supreme Court recently overruled *People v White*, 390 Mich 245; 212 NW2d 222 (1973), which defined the term "same offense" as "same transaction" where a defendant's right to be free from double jeopardy was violated by multiple prosecutions for the same offense. *People v Nutt*, ___ Mich ___; 677 NW2d a (Docket No. 120489, filed April 2, 2004), slip op at 1-2. The Court expressly stated that it was "not here concerned with the meaning of the term 'offense' as it applies to the double jeopardy protection against *multiple punishments.*" *Id.* at 12, n 11 (emphasis in original). Therefore, *Nutt* does not affect our ruling in this case.

[5] US Const Am V; Const 1963, art 1, § 15. Within this issue, Mr. Williams cursorily suggests that, because the jury acquitted him of felony-firearm, his convictions cannot stand. The elements of felony-firearm are that the defendant possessed a *firearm* during the commission or attempted commission of a felony. MCL 750.227b; *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). However, a "dangerous weapon," for purposes of armed robbery and first-degree home invasion, includes *any* article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon, not just a firearm. See MCL 750.110a(1)(b); *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993).

[6] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[7] *People v Robideau*, 419 Mich 458, 469; 355 NW2d 592 (1984). See also *People v Herron*, 464 Mich 593, 604-605; 628 NW2d 528 (2001).

[8] *Robideau*, *supra* at 470, citing *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932).

[9] *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

victim's presence or person while the defendant is armed with a weapon described in the statute.[10] The crime of assault with intent to rob while armed requires proof of: (1) an assault with force and violence, (2) an intent to rob or steal, and (3) an armed defendant.[11] Furthermore, this Court has already determined that assault with intent to rob while armed is a necessarily lesser included offense of armed robbery.[12] As such, we find that the Legislature did not intend for multiple punishments for these statutory offenses.

We also do not find that one crime was completed before the other began. The offenses of assault with intent to rob while armed and armed robbery arose from the same episode of criminal behavior and were not separate and distinct. The defendants' actions were contiguous in time and place and involved the same victim. We reject the prosecution's contention that there were factually distinct assaults for which defendants could be charged. There was no point during the criminal episode where the crime of assault with intent to rob while armed was completed before the crime of armed robbery was commenced and completed. Accordingly, we vacate defendants' convictions and sentences for assault with intent to rob while armed.[13]

III. Sufficiency of the Evidence

Mr. Perry also argues that the evidence was insufficient to support his convictions for armed robbery and first-degree home invasion because certain witnesses testified inconsistently and were incredible. We disagree. In sufficiency of the evidence claims, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[14] "[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."[15]

As noted *supra*, a conviction for armed robbery requires an assault and a felonious taking of property from the victim's presence or person while the defendant is armed with a weapon described in the statute.[16] The elements of first-degree home invasion are: (1) breaking and entering a dwelling or entering without permission; (2) the defendant intended to, or actually did,

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[10] *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001).

[11] *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991).

[12] *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003); *People v Antoine*, 194 Mich App 189, 190; 486 NW2d 92 (1992).

[13] The appropriate remedy for a double jeopardy violation involving multiple punishments is to affirm the conviction of the higher charged offense and vacate the lesser. See *Herron*, *supra* at 609.

[14] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

[15] *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

[16] *Rodgers*, *supra*.

commit a felony, larceny, or assault while entering, being present in, or exiting the dwelling; (3) while armed with a dangerous weapon or another person was lawfully present in the dwelling.[17]

Viewed in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to infer all the necessary elements of armed robbery and first-degree home invasion. Mr. Gaston had known both defendants for several years and could easily identify them as his assailants. Mr. Perry hit Mr. Gaston with a weapon upon entering the home. Both defendants repeatedly hit Mr. Gaston in the head and back over a period of several minutes, before holding him at gunpoint and looting the home. Mr. Perry then tied Mr. Gaston's hands and feet with telephone cords and stole the boots from his feet. This Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses.[18] Moreover, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides.[19] Accordingly, we find that the prosecution presented sufficient evidence to support Mr. Perry's convictions for armed robbery and home invasion.

IV. Jail Credit

Mr. Perry contends that his judgment of sentence should be corrected to reflect the accurate amount of jail credit for time served. The prosecution concedes, and we agree, that Mr. Perry's judgment of sentence incorrectly indicates that he was entitled to only 215 days of credit.[20] The Presentence Investigation Report indicates that, following his arrest, Mr. Perry was jailed from May 2, 2002, until his January 3, 2003 sentencing. As a result, Mr. Perry was entitled to 245 days of credit. We, therefore, remand to allow the trial court to correct Mr. Perry's judgment of sentence to accurately reflect the jail credit for time served.[21]

In Docket No. 246928, we affirm Mr. Perry's convictions for armed robbery and first-degree home invasion, vacate his conviction for assault with intent to rob while armed, and remand for correction of his judgment of sentence. We do not retain jurisdiction.

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[17] MCL 750.110a(2).

[18] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

[19] *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

[20] See MCL 769.11b.

[21] See MCR 6.435(A); MCR 7.216(A).

In Docket No. 247536, we affirm Mr. Williams's convictions and sentences for armed robbery and first-degree home invasion and vacate his sentence and conviction for assault with intent to rob while armed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper